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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LAWRENCE E. NIELSEN et al.,

Cross-complainants and Respondents,

v.

MERCER MACPHERSON et al.,

Cross-defendants and Appellants.

G059758

(Super. Ct. No. 30-2020-01143744)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed and remanded with directions. Motion to augment record. Denied.

Flyer and Flyer, David R. Flyer, Raquel Flyer Dachner; Veatch Carlson and Robert Thomas Mackey for Cross-defendants and Appellants.

Rutan & Tucker, Michael D. Adams and Sarah Gilmartin for Cross-complainants and Respondents.

* * *

INTRODUCTION

Mercer and Carol MacPherson (the MacPhersons) brought a special motion to strike, made pursuant to Code of Civil Procedure section 425.16¹ (all code citations are to the Code of Civil Procedure), that was directed to two causes of action asserted in a cross-complaint filed by Lawrence and Margaret Nielsen (the Nielsens). The trial court denied the MacPhersons' anti-SLAPP motion and awarded the Nielsens \$9,800 in attorney fees pursuant to section 425.16, subdivision (c)(1) (section 425.16(c)(1)). The MacPhersons appealed from the order awarding the Nielsens attorney fees and do not challenge the order denying their anti-SLAPP motion.

A party successfully opposing an anti-SLAPP motion is entitled to recover attorney fees only if the trial court finds the anti-SLAPP motion was frivolous or intended to cause unnecessary delay. (§ 425.16(c)(1); see § 425.16, subd. (h).) That is the case regardless whether the party opposing the anti-SLAPP motion is a plaintiff or a cross-complainant.

Thus, under section 425.16(c)(1), a finding that the MacPhersons' anti-SLAPP motion was frivolous or intended to cause unnecessary delay was required in order to award the Nielsens attorney fees as they were cross-complainants who successfully opposed the anti-SLAPP motion. However, the trial court's order did not satisfy this requirement: The court made no finding that the MacPhersons' anti-SLAPP motion was frivolous or intended to cause unnecessary delay. The reason cited by the court for awarding the Nielsens attorney fees was that the MacPhersons' anti-SLAPP motion was denied. This reason does not, as a matter of law, support an award of attorney fees under section 425.16(c)(1), and we therefore reverse with directions to deny the attorney fee request.

¹ The anti-SLAPP statute. “‘SLAPP’ is an acronym for ‘strategic lawsuit against public participation.’” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1.) We refer to the special motion authorized by section 425.16, subdivision (b)(1) as an anti-SLAPP motion.

ALLEGATIONS AND FACTS

The MacPhersons have lived next door to the Nielsens for over 40 years. In May 2008, the MacPhersons and the Nielsens reached an agreement regarding the extension of a boundary wall. The MacPhersons alleged that in reliance on that agreement, they built a decorative wall and landscaped the area on their side of the boundary wall. The MacPhersons alleged that “in derogation” of the agreement, and in violation of applicable municipal code, the Nielsens built a “spite wall” that is about 42 inches in height and extends along the property boundary almost to the street.

The MacPhersons filed a complaint against the Nielsens in which the MacPhersons asserted causes of action for public nuisance, private nuisance, and injunction for prescriptive easement. The MacPhersons alleged the wall built by the Nielsens was offensive because (1) “it blocks the vision[] of [the MacPhersons] as they back out of their driveway and obscures the vision of passing motorists”; (2) “the wall height is such that it permits children and trespassers to easily surmount it and then crawl over a side yard wall into [the MacPhersons]’ back yard with access to their swimming pool”; and (3) “construction of the wall altered water flow into [the MacPhersons]’ yard.”

The Nielsens answered and filed a cross-complaint against the MacPhersons for trespass to land, private nuisance, trespass to personal property, conversion, civil stalking, and civil harassment. The Nielsens’ civil stalking claim was based on the allegation that “[t]he MacPhersons’ conduct in walking around the Nielsens’ property [i.e., trespassing] pacing the street and scrutinizing the property line, watching to see if the Nielsens were home and then coming by unannounced to argue the property line, and peeping through the window in their door and thereby forcing the Nielsens to cover the window with paper, constituted a credible threat.” The Nielsens’ civil harassment claim was based on the allegation that “[b]y repeatedly trespassing on the Nielsens’ property, destroying their personal property, and harassing the Nielsens regarding the property line and water-related issues, the MacPhersons have engaged in an

intentional course of conduct directed at the Nielsens that would cause a reasonable person to suffer substantial emotional distress and actually caused the Nielsens to suffer such distress.”

THE MacPHERSONS’ ANTI-SLAPP MOTION

The MacPhersons filed an anti-SLAPP motion to strike the civil stalking and civil harassment causes of action from the Nielsens’ cross-complaint. The MacPhersons contended that they had filed their complaint against the Nielsens and registered complaints with city representatives “to mitigate driving safety and pool safety hazards affecting the public” and that the Nielsens brought their cross-complaint in retaliation for the MacPhersons exercising their constitutional rights.

The Nielsens filed opposition to the MacPhersons’ anti-SLAPP motion and, in that opposition, requested attorney fees in the amount of \$10,930.50 pursuant to section 425.16(c)(1). They argued the anti-SLAPP motion was frivolous and the MacPhersons had brought it in bad faith.

In reply to the Nielsens’ opposition, the MacPhersons argued that in seeking attorney fees, the Nielsens failed to comply with section 128.5, subdivision (f)(1)(B), by failing to bring a separate motion with 21 days’ prospective notice and opportunity to cure.

Soon after the outset of the hearing on the anti-SLAPP motion, the trial court reviewed the issues and the two-step analysis for deciding anti-SLAPP motions and announced a tentative decision to deny the motion. The court said nothing about sanctions or attorney fees. The court then invited argument by counsel. After hearing argument by the MacPhersons’ counsel, the court stated: “So my ruling is going to be as I said it would be. I’m denying the anti-SLAPP motion as to each of those two causes of action.” The Nielsens’ counsel then reminded the court that the Nielsens were seeking attorney fees. The court stated it would look at the issue of attorney fees. The court

confirmed that its decision “will be the order of the court” and advised it would “let you know about attorneys fees.”

On the same day as the hearing, the trial court issued a minute order denying the anti-SLAPP motion and granting the Nielsens’ request for attorney fees. The order states in full: “As more fully discussed on the record, anti-SLAPP motions denied as to both causes of action. The court finds that moving parties have failed on the first prong to demonstrate that either cause of action arises out of their Constitutionally-protected free speech or petitioning activity. Alternatively, the court also finds that, even if there were facts adequately alleging Constitutionally-protected activity, on the evidentiary second prong which is to be determined on a summary judgment type procedure [citation], the moving parties have failed to demonstrate a ‘probability’ of prevailing at trial. [¶] The court also finds that the Nielsen parties *are therefore* entitled to reasonable attorney fees per CCP § 425.16(c). The court has been unable to locate detailed backup in support of the Nielsen[s’] requested figure, but based on the Gilmartin declaration it grants attorney fees in the sum of \$9800. [¶] Clerk to give notice.” (Italics added.)

The MacPhersons filed a notice of appeal from the order awarding the Nielsens attorney fees. The order awarding fees is appealable under section 904.1, subdivision (a)(12) as an order directing payment of monetary sanctions in an amount exceeding \$5,000. The MacPhersons have filed an unopposed motion to augment the record. The motion to augment the record is denied.²

² The MacPhersons moved to augment the record with two documents: (1) Notice of Motion and Motion for Judgment on the Pleadings filed by the Nielsens and (2) Request for Judicial Notice in Support of Motion for Judgment on the Pleadings filed by the Nielsens. Neither document is file-stamped by the court, but both appear to be dated March 29, 2021. The order being appealed was entered on November 13, 2020 and the notice of appeal was filed on December 22, 2020. The documents with which the MacPhersons seek to augment the record therefore were not part of the record and before the trial court when it made its ruling. (*Vons Companies, Inc. v. Seabest Foods, Inc.*

DISCUSSION

I.

Relevant Law and Standard of Review

A defendant or cross-defendant who prevails on an anti-SLAPP motion is, with one exception, entitled to recover attorney fees and costs. (§ 425.16(c)(1).) In contrast, if an anti-SLAPP motion is denied, the party who opposed the motion is entitled to recover attorney fees and costs only if the court finds the motion was frivolous or intended to cause unnecessary delay. The second sentence of section 425.16(c)(1) reads: “If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.”

By authorizing an award of attorney fees and costs “pursuant to [s]ection 128.5,” section 415.26(c)(1) incorporates the procedures and substantive requirements of section 128.5. (*Rudisill v. California Coastal Com.* (2019) 35 Cal.App.5th 1062, 1070; *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 879.) Section 128.5, subdivision (c) requires that an order awarding attorney fees be in writing and “recite in detail the action or tactic or circumstances justifying the order.” The trial court therefore was required in its written order to recite in detail the reasons for the award of attorney fees. (*Nunez v. Pennisi, supra*, at pp. 879-880; *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 686 (*Chitsazzadeh*).)

“An award of sanctions under the anti-SLAPP statute has two elements. First, the trial court must make a finding the SLAPP motion was frivolous or brought solely to delay the proceedings. Second, the court must follow the procedural requirements for a sanction order set out in section 128.5 which requires, among other

(1996) 14 Cal.4th 434, 444, fn. 3.) The appellate record may not be augmented with matters arising during the pendency of the appeal. (*In re K.M.* (2015) 242 Cal.App.4th 450, 456.)

things, the order ‘shall recite in detail the conduct or circumstances justifying the order.’” (*Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 682.)

“A trial court’s ruling ordering attorney fees for a frivolous anti-SLAPP motion is usually reviewed under the abuse of discretion standard.” (*Rudisill v. California Coastal Com.*, *supra*, 35 Cal.App.5th at p. 1070.) Issues of law presented by an order awarding attorney fees are reviewed under the de novo standard. (*Ibid.*)

II.

The Trial Court Failed to Make an Express Finding of Frivolousness or Intent to Cause Unnecessary Delay

The trial court’s order awarding the Nielsens attorney fees fails to satisfy the first element: The court made no finding, either in the written order or during the hearing, that the anti-SLAPP motion was frivolous or that the MacPhersons brought it solely to cause unnecessary delay.

An appellate court might usually infer the trial court made every implied finding necessary to support the order and review those implied findings for substantial evidence. (See *Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1; *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619; *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708; *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567.) But the record in this case and precedent do not permit a conclusion that the trial court made implied findings necessary to uphold the award of attorney fees.

Case law is consistent in holding that some appropriate express findings are necessary to infer implied findings in cases in which attorney fees are imposed as sanctions. In *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, the appellate court interpreted a sanctions order as including an implied finding of bad faith because the trial court had made an express finding of frivolousness. (*Id.*, at

pp. 1070-1071, fn. 19.) In *In re Marriage of Sahafzadeh-Taeb & Taeb* (2019) 39 Cal.App.5th 124, 143 (*Taeb*), the trial court recited in detail the factual circumstances leading to the imposition of sanctions under section 128.5 and made an express finding of frivolousness. The trial court did not, however, make an express finding of bad faith. (*Taeb, supra*, at p. 143.) The appellate court was willing to infer an implied finding of bad faith because the trial court provided “a thorough recitation of the conduct for which the sanctions were imposed, and which conduct may, under established case law, be sanctioned.” (*Id.* at p. 145.)

In *Chitsazzadeh, supra*, 199 Cal.App.4th at pages 683 to 684, the trial court did not make an express finding that an anti-SLAPP motion was frivolous or intended to cause unnecessary delay. The appellate court concluded the trial court had made implied findings because the trial court’s written tentative ruling (1) quoted section 425.16(c)(1), (2) stated that the defendants had failed to respond to the plaintiffs’ argument that the anti-SLAPP motion was frivolous, and (3) stated that the plaintiffs were entitled to a monetary sanction under section 425.16(c)(1). (*Chitsazzadeh, supra*, at p. 684, fn. 6.)

In each of the cited cases, the record showed that the trial court had made at least one express finding predicate to an award of sanctions or had made written statements or express findings from which it could be inferred that the trial court had made an implied finding of frivolousness or bad faith. That is not the situation here. In the matter before us, unlike the cases just cited, the trial court did not issue a written tentative ruling and at no time before issuing the written order made any statement about imposing sanctions or awarding attorney fees. Neither in the written order nor at the hearing on the anti-SLAPP motion did the trial make an express finding of frivolousness or intent to cause delay, or make any comment suggesting an intent to award attorney fees. The trial court took the matter of attorney fees under submission without quoting or mentioning section 425.16(c)(1) or section 128.5 and, in the written order, awarded the Niensens’ attorney fees on the ground only that the anti-SLAPP motion had been denied.

As we shall explain, bringing an unsuccessful anti-SLAPP motion is not in itself conduct or a circumstance justifying an award of attorney fees. We cannot conclude the trial court made implied findings on frivolousness or intent to cause unnecessary delay because nothing in the record suggests the court even considered those issues.

Express findings in support of an award of sanctions is “the better practice.” (*Taeb, supra*, 39 Cal.App.5th at p. 143; see *Summers v. City of Cathedral City, supra*, 225 Cal.App.3d at pp. 1070-1071, fn. 19.) As will be discussed in part III, even if we assume that the trial court’s written order includes an implied finding of frivolousness or intent to cause unnecessary delay, the reason cited in the order for imposing sanctions is inadequate.

III.

The Trial Court’s Written Order Recites the Reason for Awarding Attorney Fees

The parties argue at length the issue whether the trial court’s written order includes a detailed recitation of the conduct or circumstances justifying the order as required by section 425.16(c)(1) and section 128.5. The MacPhersons argue the trial court’s order does not recite in detail the conduct or circumstances justifying the award of attorney fees. The Nielsens argue the MacPhersons forfeited any claim the trial court’s written order does not meet this requirement because the MacPhersons never objected to the court’s order.

The MacPhersons were not required to object to the trial court’s written order because, we conclude, the order complies with section 425.16(c)(1) and section 128.5. The order recites, as the reason for awarding attorney fees, the court’s denial of the MacPherson’s anti-SLAPP motion. The written order states that the anti-SLAPP motion is denied as both causes of action and, after reciting in general terms the reasons

for denying the anti-SLAPP motion, states the Nielsens are “*therefore* entitled to reasonable attorney fees.” Use of the word “therefore” signifies that denial of the anti-SLAPP motion was the reason for awarding the Nielsens reasonable attorney fees; that is, “[the] anti-SLAPP motions denied as to both causes of action” *therefore* “the Nielsen parties are . . . entitled to reasonable attorney fees.” An equivalent phrasing is: “[T]he Nielsen parties are . . . entitled to reasonable attorney fees” *because* “[the] anti-SLAPP motions denied as to both causes of action.”

The trial court’s written order therefore does recite with “‘reasonable specificity’” (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1389) the conduct or tactics or circumstances leading to the award of attorney fees. We take the trial court at its word: The court found that the conduct or circumstances justifying an award of attorney fees was that the MacPhersons had brought an anti-SLAPP motion and the motion was denied. No more was necessary. (See *Chitsazzadeh, supra*, 199 Cal.App.4th at pp. 684-685 [recitation that the defendants filed anti-SLAPP motion after 60-day deadline without seeking leave of court was sufficient specification of reasons].) A reason stated for awarding attorney fees under section 425.16(c)(1) is not insufficiently detailed merely because the reason given does not justify the award. Because the written order recited the reason for imposing sanctions, the MacPhersons were not required to object to the order to preserve their claim of error.

Our conclusion is consistent with *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382 (*Decker*). In *Decker*, the trial court signed an order denying anti-SLAPP motions and, in the order, found the motions were frivolous and awarded the plaintiffs attorney fees. (*Id.* at p. 1386.) A panel of this court concluded the finding that the anti-SLAPP motions were frivolous did not comply with the requirement of section 425.16(c)(1) and section 128.5 of a detailed recitation of the conduct or circumstances justifying the award of attorney fees. (*Decker, supra*, at p. 1392.) In the present case, the trial court did not make a finding that the MacPhersons’ anti-SLAPP motion was

frivolous or intended to cause unnecessary delay, and the court's written order, by using the word "therefore," refers to denial of the anti-SLAPP motion as the reason for awarding the Nielsens attorney fees.

The Nielsens urge us to consider the reporter's transcript of the hearing on the MacPhersons' anti-SLAPP motion which, they contend, includes a recitation of the court's reasons for awarding them attorney fees. We do not consider the transcript because the court's written order recites the full reason for awarding attorney fees. "An oral . . . opinion by a trial judge, discussing and purporting to decide the issues, . . . is merely an informal statement of his views. . . . [I]t is not itself the decision of the court or a judgment." (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 77-78; see *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 523 ["We decline to consider the court's oral comments . . . or use those comments to construe the minute order entered"].) The minute order gives the trial court's formal reason for awarding attorney fees: The MacPhersons brought an anti-SLAPP motion that was denied.

Moreover, a transcript of oral proceedings may supply the requisite recitation of conduct or circumstances supporting a sanctions award if the transcript is incorporated by reference into the court's written order. (*Foundation for Taxpayer & Consumer Rights v. Garamendi, supra*, 132 Cal.App.4th at p. 1388; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 997; see *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1576 [trial court's order incorporated by reference the statement of decision].) Here, the trial court's written order awarding attorney fees does not incorporate by reference the reporter's transcript of the hearing on the anti-SLAPP motion. The written order states, "[a]s more fully discussed on the record, anti-SLAPP motions denied." A reference to the record is not the same thing as incorporation by reference of the record.

At no time during the hearing did the trial court make a finding, or even so much as make a comment, that the anti-SLAPP motion was frivolous or intended to cause

unnecessary delay. The court did not give any reasons on the record for awarding attorney fees because the court took the request for attorney fees under submission rather than rule on it. Thus, even if we were to consider the transcript, the result would be the same, namely, the trial court's reasons do not support the award of attorney fees.

IV.

The Reason Recited by the Trial Court in Its Written Order Does Not Support an Award of Attorney Fees.

The reason recited in the trial court's written order does not support an award of attorney fees. The Nielsens were not entitled to attorney fees simply because the trial court had denied the MacPhersons' anti-SLAPP motion. An unsuccessful anti-SLAPP motion is not ipso facto frivolous or intended to cause unnecessary delay.

The trial court's reason for awarding the Nielsens attorney fees was legally inadequate; therefore, we reverse the order with directions to deny the request for attorney fees. "Because the trial court has already specified the reason for the fee award, and that reason is inadequate, there is no need to request a further statement of reasons. Instead, we believe the appropriate disposition is to reverse the order awarding fees with directions to deny the request for fees." (*Chitsazzadeh, supra*, 199 Cal.App.4th at p. 685.)

Our decision means we need not address the MacPhersons' argument that the Nielsens' request for attorney fees under section 425.16(c)(1) was subject to the 21-day safe harbor provision of section 128.5, subdivision (f). (See *Changsha Metro Group Co., Ltd. v. Xufeng* (2020) 57 Cal.App.5th 1, 21, 22-23 [attorney fee request under section 425.16(c)(1) is not subject to section 128.5, subdivision (f) safe harbor provision].)

DISPOSITION

The order awarding attorney fees is reversed and the matter is remanded with directions to the trial court to deny the Nielsens' request for attorney fees. Appellants to recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

MARKS, J.*

*Judge of the Orange Super. Ct., assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.